

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME : FEBRUARY 14, 2006
JUDGE : GAIL D. OHANESIAN
REPORTER : NONE

DEPT. NO : 11
CLERK : C. LEWIS
BAILIFF : NONE

SOUTHERN CALIFORNIA EDISON, PACIFIC GAS AND
ELECTRIC COMPANY and SAN DIEGO GAS &
ELECTRIC COMPANY ,
Petitioners,

COUNSEL:
BEN DAVIDIAN
VICKI THOMPSON
CHRISTOPHER WARNER
BETH FOX

VS. Case No.: 05CS01482

STATE ENERGY RESOURCES CONSERVATION AND
DEVELOPEMENT COMMISSION,
Respondent.

WILLIAM CHAMBERLAIN
CARYN HOLMES

Nature of Proceedings: PETITION FOR WRIT OF MANDATE and MOTION TO
AUGMENT RECORD or REQUEST FOR JUDICIAL NOTICE

Ruling on Submitted Matter

1. Motion to Augment Record, or in the Alternative, Request for Judicial Notice is granted as to Exhibits A, B, and C, there being no opposition regarding these documents, and denied as to Exhibits D and E. Exhibits D and E were not before respondent commission at the time of its decision and are otherwise irrelevant to the court's review of the respondent's decision pursuant to Public Resources Code section 25901(b).

2. Petition for Writ of Administrative Mandate.

In this action, the three petitioners challenge respondent's September 7, 2005 decision which denied their appeals of the Executive Director's Notice of Intent to Release Aggregated Data.

The petition includes four claims, one corresponding to each category of aggregated data which some or all of the petitioners contended should not be released. The first claim, by all petitioners, concerns bundled customer annual capacity data. The second claim, by all petitioners, concerns bundled customer quarterly capacity data. The third claim, by SCE and PG&E, concerns bundled customer quarterly energy data. The fourth claim, by PG&E and SDG&E, concerns planning area quarterly capacity data.

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Deputy Clerk

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Public Resources Code section 25901, subdivision (b), provides that the decision of the commission shall be sustained "unless the court finds (1) that the commission proceeded without, or in excess of its jurisdiction, (2) that, based exclusively upon a review of the record before the commission, the decision is not supported by substantial evidence in light of the whole record, or (3) that the commission failed to proceed in the manner required by law." (Pub. Resources Code, § 25901, subd. (b).)

Petitioners contend that each of the three statutory bases requires that the decision be set aside.

Petitioners contend that respondent failed to proceed in the manner required by law in that it applied an incorrect legal standard, and that the proper application of the law governing respondent's analysis requires confidentiality protection for petitioners' data. They contend that respondent should have applied the standard in section 2505(a)(3)(A) of title 20 of the California Code of Regulations. That provision refers to "a reasonable claim that the public Records Act or other provision of law authorizes the Commission to keep the record confidential." (Cal. Code Regs., tit. 20, § 2505(a)(3)(A) (emphasis added).) Petitioners contend that instead of this "reasonable claim" standard, respondent applied an improperly heightened legal standard, that is, whether petitioners' data strictly meets the trade secret test.

Petitioners' contention regarding the standard is without merit. Section 2505 of respondent's regulations only applies to initial applications for confidentiality. Such initial applications had been granted earlier. The applicable regulation in this case is section 2507, which provides that the commission may release confidential information "if the information has been masked or aggregated to the point necessary to protect confidentiality." (Cal. Code Regs., tit. 20, § 2507, subd. (d).) The term "reasonable claim" does not appear anywhere in section 2507.

Petitioners also contend that respondent failed to correctly apply trade secret law. Civil Code section 3426.1(d) provides that information is deemed a trade secret when it derives "actual or potential" economic value from being kept confidential. Petitioners contend that respondent focuses its analysis solely on the actual value of petitioners' data, and not the potential value. However, the decision accurately sets out the applicable definition at page 3, and paraphrases it at page 14. As to each category of aggregated data, respondent concluded that the data "will not cause the IOUs to lose an economic advantage or other market participants to gain an

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economic advantage vis-a-vis the IOUs" (Decision, p. 26, conclusion 4; p. 28, conclusion 2; p. 29-30, conclusion 2; p. 30, conclusion 1; p. 30, conclusion 1.) Although the Findings of Fact and Conclusions of Law do not explicitly refer to "potential" economic value, it is implicit in the decision that the data has no potential economic value. Petitioners have not established that respondent did not apply the correct definition or standard for a trade secret.

Petitioners contend that the decision is not supported by substantial evidence. The court finds this contention to be without merit. There was extensive written evidence submitted by petitioners and by respondent's staff, and there was a lengthy evidentiary hearing. Petitioners' evidence included a study by Dr. Charles Plott, and a subsequent study intended to respond to criticisms of the first study. Petitioners also submitted evidence from Mike McClenahan (SDG&E), Kevin Cini (SCE), Dr. Charles Stern (SCE), and Stuart Hemphill (SCE), James Shandalov (PG&E), and Roy Kuga (PG&E). The Commission received evidence from its staff, including Dr. Michael Jaske, Ms. Julia Frayer and Dr. Kevin Kennedy. In addition, there was evidence from the Independent Energy Providers' witness, Stephen Kelly.

Petitioners contend that the evidence provided by commission staff and relied upon by the commission is significantly flawed. They contend that the testimony of Frayer, Jaske and Kennedy contain numerous errors and inconsistencies and that, further, the commission witnesses do not have the direct experience in the market that petitioners' witnesses have.

The court, in its review of this matter, is not to re-weigh the evidence. It is to determine whether petitioner has shown that the decision is not supported by substantial evidence in light of the whole record. (Pub. Resources Code, § 25901, subd. (b).) The court finds that the commission's witnesses showed that they had sufficient credentials and basis for their testimony and the court finds that their testimony is substantial evidence. The court also finds that petitioners have not shown that respondent's criticism of the Plott studies was erroneous. The court finds that the decision is supported by substantial evidence in light of the whole record.

Petitioners contend that respondent acted in excess of its jurisdiction by erroneously ordering the public release of petitioners' data. This contention overlaps with the arguments that respondent failed to proceed in the manner required by law and that the decision is not supported by substantial evidence. The court has found against petitioners on those

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issues. Petitioners also contend that respondent exceeded its jurisdiction as an agent of the California Public Utilities Commission by ordering the public release of petitioners' market-sensitive data. Petitioners contend that as an agent of the CPUC, respondent is bound by Public Utilities Code section 454.5, subdivision (g), to make the disputed material confidential. The court finds that Public Utilities Code section 454.5, subdivision (g) does not apply to respondent commission. Respondent is not acting as an agent of the CPUC. They are separate agencies with separate responsibilities. The fact that they have agreed to cooperate in some respects does not make one the agent of the other when it is fulfilling its own duties.

The court finds that petitioners' contentions that respondent acted in excess of jurisdiction, that the decision was not supported by the evidence and that respondent failed to proceed in the manner required by law are without merit.

The petition for writ of mandate is denied. Petitioner's request for damages is also denied.

Respondent shall prepare a judgment consistent with this ruling and in compliance with California Rules of Court, rule 391. Respondent shall recover its costs pursuant to a memorandum of costs, including any costs recoverable under Government Code section 6103.5.

Dated:



Honorable GAIL D. OHANESIAN,
Judge of the Superior Court of California,
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CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: 02-14-06

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